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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 771

WILLIAM CARL, MAX BASS, HARRY MYERS, SOLOMON BERGMAN, GEORGE KAY d/b/a Lorie Press, WILLIAM LOURIE, HOWARDTON GARAGE CO. INC., SCHUCKMAN PRESS, INC., 145-147 WOOLSEY CORPORATION, individually and on behalf of all others similarly situated,

Petitioners,

against

ALBERT M. COLE, as Administrator, Federal Housing and Home Finance Agency, WALTER S. FRIED, as Regional Administrator, Region 1, Federal Housing and Home Finance Agency, CITY OF NEW YORK, ROBERT F. WAGNER, individually as Mayor of the City of New York and a member of the Board of Estimate; ABE STARK, individually and as President of the City Council of the City of New York and a member of the Board of Estimate; HULAN E. JACK, individually and as President of the Borough of Manhattan, City of New York, and a member of the Board of Estimate; JAMES J. LYONS, individually and as President of the Borough of Bronx, City of New York, and a member of the Board of Estimate; JOHN CASHMORE, individually and as President of the Borough of Brooklyn, City of New York, and a member of the Board of Estimate; JAMES J. CRISONA, individually and as President of the Borough of Queens, City of New York, and a member of the Board of Estimate; ALBERT V. MANISCALCO, individually and as President of the Borough of Richmond, City of New York, and a member of the Board of Estimate; ROBERT MOSES, individually and as Chairman of the Committee on Slum Clearance of the City of New York, FORDHAM UNIVERSITY; LINCOLN CENTER FOR THE PERFORMING ARTS, INC.; and WEBB & KNAPP LINCOLN SQUARE CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION OF LINCOLN CENTER FOR THE PERFORMING ARTS, INC., RESPONDENT

WILLIAM ELDRED JACKSON
15 Broad Street
New York 5, New York
Attorney for Lincoln Center for the Performing Arts, Inc., Respondent

REBECCA M. CUTLER
15 Broad Street
New York 5, N. Y.
Of Counsel

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION OF LINCOLN CENTER FOR THE PERFORMING ARTS, INC., RESPONDENT

Questions Presented

In this, the fifth class action on behalf of owners and tenants attacking the constitutionality of the Lincoln Square Urban Renewal Plan in the City of New York,[1] the record presents no substantial federal question. The questions raised by petitioners amount only to these:

1. Whether the "Establishment of Religion" clause of the First Amendment was violated by the

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[1] The prior actions are referred to in the opinion below (Appendix "B" to petition, p. 28a, footnote 1).

grant of federal funds to the city as part of the city's cost, where the city's condemnation, resale and other acts have been held constitutional by a prior judgment conceded to be *res judicata* as to the city and denied review by this Court.

2. Whether the federal administrator's determination under the Housing Act to grant federal funds to the city was such an "adjudication" of tenants' rights as to require him, either by reason of the "Due Process" clause of the Fifth Amendment or the Administrative Procedure Act, to grant to tenants a formal hearing not required by the Housing Act, where responsible city agencies did hold public hearings as required by the Act.

Statement

The petition (p. 3) purports to seek review of only that part of the judgment of the United States Court of Appeals for the Second Circuit entered January 16, 1959, which was rendered in favor of the federal officials, who were not parties to the prior action, *64th Street Residences Inc. et al.* v. *City of New York et al.*, 4 N. Y. 2d 268 (1958), *cert. denied sub nom. Harris et al.* v. *City of New York et al.*, 357 U. S. 907 (herein called the "*64th Street*" action).

On principles of *res judicata* the Court below held the *64th Street* judgment to bar further litigation of the issue as to "establishment of religion" both as against the city officials and private redevelopers, and as against the federal officials.

By the limited review sought, petitioners now concede for the first time that their claim of unconstitutionality against the city and redevelopers is *res judi-*

cata by virtue of the *64th Street* judgment. They nevertheless contend that the same claim remains open as against the federal officials.

The other allegations against the federal officials, based on lack of a formal hearing, were found by the Court below to be insufficient in law.

The Project, Condemnation, and Resale

The Lincoln Square Urban Renewal Project involves the clearance and redevelopment of an area duly found by the New York City Planning Commission—in a finding never challenged—to be substandard and insanitary (R. 92).[1]

After inviting preliminary bids the city obtained commitments from proposed redevelopers (called "sponsors") to make minimum bids at public auction sales of specified sites within the project area and to carry out the public purposes of slum clearance and redevelopment subject to reuse restrictions (R. 14, 15, 153, 166, 178, 61-4).

On November 12, 1956, eight tenants in the area (including two of these petitioners) on behalf of themselves and others similarly situated, represented by the same attorney who represents these petitioners, petitioned the Federal Housing and Home Finance Agency to "intervene" and be heard on their claims

[1] Page references preceded by "R." refer to the printed record in the New York Court of Appeals in the *64th Street* action, which was incorporated by reference in the record below (128a) and was before both the District Court and the Court of Appeals; that record is on file in this Court in connection with the petition for certiorari in *Harris et al. v. City of New York et al.*, 357 U. S. 907 (October Term, 1957, Docket No. 1014). Page references followed by "a" refer to the Appendix to Appellants' Brief as printed for the Court below.

that the project would increase the housing shortage, did not fulfill relocation requirements of the Housing Act, and violated the First and Fourteenth Amendments to the Constitution (63a-67a). By reply dated November 30, 1956, the Acting Urban Renewal Commissioner agreed that the petition and supporting memorandum of facts and law would be considered (68a-69a). Both previously and subsequently, the City Board of Estimate held public hearings on the project plan (R. 28-29; 18a, 36a), and at one such hearing appearances in opposition were made by various owners and tenants, including the president of one of these petitioners, and by petitioners' attorney (R. 151, 172, 175-6, 28; 32a, 36a). Subsequently the City Planning Commission also held public hearings on the plan (18a).

The Board of Estimate, acting upon consent and findings required by New York General Municipal Law, § 72-k, including its own finding that acquisition was in the interest of the city's health and welfare and effectuation of the statutory purpose of rehabilitation of a substandard area, authorized condemnation of sites comprising the project area (R. 92-99, 78-79). Pursuant to the Board's authorization (R. 102, 82, 39-40, 46), the city entered into (19a-20a): (1) contracts with sponsors obligating the sponsor to make a minimum bid at public auction for a specified site and the city to sell to the sponsor if the highest bidder; and (2) a capital grant contract with the federal government obligating the latter to contribute two-thirds of the difference between the city's cost of condemnation and the proceeds from resale (R. 62-4, 143-4, 90-91). The city then condemned the area (20a).

Pursuant to the Board of Estimate's separate resolution (R. 101), separate sites within the area were offered and sold at public auction, subject to specified reuse restrictions, to the American Red Cross, Webb & Knapp Lincoln Square Housing Corporation, and this respondent, Lincoln Center for the Performing Arts, Inc. (20a) (a non-profit, charitable corporation obligated under its sponsorship contract and deed to relocate tenants, clear the site, and construct a cultural center, including a new Metropolitan Opera house and Philharmonic-Symphony concert hall (R. 143-4)). The eligibility of these purchasers is unquestioned.

Another separate site was sold at public auction to Fordham University, a sectarian educational institution, subject to educational reuse restrictions (R. 62-3, 92-99, 105, 20a). While petitioners claim that the sale to Fordham involved a forbidden subsidy of public funds to a religious institution, the facts are that (1) Fordham's purchase price was greater than any of three different appraisals of the reuse value of the land, two of which were based on a use (housing) more valuable than the educational use (R. 129-31); and that (2) the sale was made at public auction for which bids were solicited and at which non-sectarian educational redevelopers were free to bid (R. 62-3, 166-171). Moreover, Fordham was obligated at its own expense to clear and redevelop the land according to the reuse requirements (R. 64).

The 64th Street Action

The action was brought in the New York Supreme Court by alleged property owners, suing under Section 51 of the New York General Municipal Law, and alleged residential and business tenants on behalf of

themselves and others similarly situated, represented by the same attorney as these petitioners. Named defendants were the city and various officials. These respondents, being sponsors, intervened as defendants (R. 143, 137, 2).

The complaint alleged in substance that city officials, processing a plan for redevelopment of the Lincoln Square area, were authorized to apply for federal aid under the Housing Act; that Fordham University, a Catholic school, had contracted with the city to bid a minimum price at public auction for the collegiate site; that Fordham was the only possible bidder for such site, which the city would acquire at a price substantially greater than Fordham's minimum bid; that the difference constituted a direct subsidy, and the city's condemnation an indirect subsidy, to Fordham; and that the city's alleged acts, including the condemnation, were "illegal, void and a taking of public property for a non-public use in violation of the Fourteenth Amendment,"[1] and the New York constitution (R. 10-22). The complaint sought a declaration of invalidity and an injunction prohibiting condemnation of the whole area (not merely the collegiate site) and further processing of the plan (R. 21-22).

Judgment of dismissal was unanimously affirmed by the Appellate Division (R. 217) and by the New York Court of Appeals. This Court denied a petition for *certiorari* on June 9, 1958 (357 U. S. 907).

Prior to the decision of the Court of Appeals the city condemned the area and resold portions at public auction (20a).

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[1] While the complaint mentioned only the Fourteenth Amendment, plaintiffs' arguments were based on the First Amendment as made applicable to the states by the Fourteenth.

The Present Action

Plaintiffs herein, like those in the *64th Street* action, are alleged owners or tenants in the area who again sue, through the same attorney, on behalf of themselves and all others similarly situated (9a). Defendants, in addition to those in the prior action, include two officials of the Federal Housing and Home Finance Agency.

The complaint alleges in substance the same claim as the *64th Street* complaint—i.e., that the project involves a subsidy of public funds to Fordham and is therefore contrary to the First and Fourteenth Amendments. The allegations of fact and legal theory are substantially identical, as appears from the city's tabular comparison of the complaints and papers in the 'two actions' (114a-116a).

While plaintiffs herein also claim denial of federal procedural due process or statutory right, because the Federal Housing and Home Finance Administrator refused a formal hearing, the relief sought is basically the same as that sought in the *64th Street* action, i. e., a declaration of invalidity and permanent injunctions (28a-30a; cf. R. 20-22).

The present action was not begun until more than a year and a half after the "petition" to the federal administrator, and until after final determination of the *64th Street* action and condemnation and resale of the area (20a, 60a).

ARGUMENT

I

The First Amendment issue as to the effect of Fordham's participation on the expenditure of federal funds is *res judicata*, without merit on the facts, and not an issue which petitioners have standing to raise.

For at least three reasons petitioners' constitutional contentions do not warrant review by this Court:

1. *The issue is res judicata.*

The Court below looked to state law to determine the effect of the prior state court judgment in the *64th Street* action, as was required in order to give that judgment "the same full faith and credit in every court within the United States" as it has "by law or usage in the courts of such State * * *" (28 U. S. C. § 1738, 62 Stat. 947). *American Surety Co.* v. *Baldwin*, 287 U. S. 156 (1932). Applying New York law, the Court correctly found the prior judgment to be *res judicata* against petitioners not only as to all defendants in the prior action (the city officials and redevelopers), but on this issue as to the federal officials as well. *Israel* v. *Wood Dolson Co.*, 1 N. Y. 2d 116 (1956); *Good Health Dairy Products Corp.* v. *Emery*, 275 N. Y. 14 (1937); *cf. Kessler* v. *Eldred*, 206 U. S. 285 (1907); *Civoru* v. *National Broadcasting Co.*, 261 F. 2d 716 (2d Cir., 1958).

While petitioners do not here question the binding effect of the prior judgment as to the city officials and redevelopers, they claim to be entitled to a fresh

determination on this point as to the federal officials, who were not made parties to the state court action.

But since, on the facts of record, the city's actions did not violate the "Establishment of Religion" clause, those of the federal government could not possibly do so. All acts in regard to Fordham were done by city officials; the federal officials merely assisted the project by payments to the city. Since the wall between church and state was not breached by the city's direct dealings with Fordham, it could not have been breached by the still more remote activities of the federal government.

The question whether there was any prohibited governmental subsidy to religion is the same as to the city and the federal government. The First Amendment in this respect is equally applicable to the federal government and to the states. *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); see *Everson* v. *Board of Education*, 330 U. S. 1, 8 (1947). Even if in the *64th Street* action unconstitutional use of federal funds had not been repeatedly urged—as it was (see for example the prior petition to this Court in *Harris* v. *City of New York*, pp. 4, 16)—failure there to raise that specific question[1] would not affect the basic issue.

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[1] Petitioners urge also that the state court would and could not pass upon the acts of the federal administrator and the use of federal funds (petition, pp. 8, 10). If so, the reasons (apart from plaintiffs' election not to join federal officials) are fundamentally lack of standing and other similar considerations likewise applicable to the Court below. This is indicated by the decisions relied on in *Hunter* v. *City of New York*, 121 N. Y. S. 2d 841, which is petitioners' only authority on this point.

2. *The 64th Street judgment was correct on the merits and this Court denied review.*

The undisputed facts of record before the lower Court were the same as those from which the New York courts concluded that there was no gift, grant or subsidy of public funds to Fordham, but an exchange of considerations pursuant to auction sale open to any other bidders able to meet the upset price established by appraisal and to clear and redevelop in accordance with the applicable restrictions. On the facts there plainly can be no substantial question as to an "establishment of religion." As the New York Court of Appeals summed up petitioners' position:

> "The argument, however, proceeds on an assumption false in fact. * * * there is no substance to the assertion, on which this whole suit depends, that Fordham is getting a gift, grant or subsidy of public property." (4 N. Y. 2d at 275, 276.)

Certiorari to review that decision was denied. *Harris* v. *City of New York*, 357 U. S. 907 (1958).

See also *Berman* v. *Parker*, 348 U. S. 26 (1954).

3. *Petitioners lack standing to raise the issue.*

The provisions of the Housing Act here involved authorize the expenditure of federal funds; the functions of the federal administrator and agency are to execute the directions for such expenditures, with a large measure of discretion.

Accordingly, the acts of the administrator and agency are within that executive area in which courts have traditionally refrained from interference. *Massachusetts* v. *Mellon, Frothingham* v. *Mellon*, 262 U. S. 447 (1923); *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113 (1940).

And even though petitioners may suffer adverse consequences, the propriety of expenditure of federal funds is a matter which they have no standing to raise. *Alabama Power Co.* v. *Ickes,* 302 U. S. 464 (1938); *Allied-City Wide* v. *Cole,* 230 F. 2d 827 (App. D. C. 1956); *cf. Frothingham* v. *Mellon,* 262 U. S. 447, 486-489 (1923); *City of Atlanta* v. *Ickes,* 308 U. S. 517 (1939).

Petitioners' occupancy has been affected not by the administrator's expenditure but by the city's condemnation. Under New York General Municipal Law, § 72-k, the right of condemnation is entirely independent of federal aid. And here the city's condemnation has been held constitutionally unassailable.

II

Petitioners had neither a Fifth Amendment nor a statutory right to a hearing before the federal administrator.

Petitioners' contention that the Federal Housing and Home Finance Administrator wrongfully refused a hearing is completely refuted by the opinion below (Appendix "B" to petition, pp. 34-36).

No such hearing is required by the Housing Act. As petitioners concede (petition, p. 12), the Act expressly provides for a public hearing before the local agency, but not the federal administrator. And the complaint expressly alleges that public hearings were had both before the City Planning Commission and the Board of Estimate (18a). Since it is the local

bodies which under the Act are responsible[1] for determining the areas to be cleared and redeveloped and for devising the plan and method of relocation,[2] it is peculiarly appropriate that the hearing should be before them rather than the federal administrator. Nothing in the Housing Act, therefore, even implies a right to any hearing before the administrator.

Since there is no right to a hearing under the Housing Act, Section 5 of the Administrative Procedure Act[3] would not better petitioners' position in this respect unless the Constitution required a hearing as a matter of procedural due process. The Administrative Procedure Act exempts from its requirement hearings of "less than statutory authority". See *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 50 (1950).

Clearly there was no such constitutional right here. The effect of the administrator's acts upon local resi-

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[1] See 42 U. S. C. § 1455; also 42 U. S. C. §§ 1451 and 1452(d). Clear expressions of the intention of Congress to put the primary responsibility on the local agencies are found in the legislative history. S. Rep. No. 84, 81st Cong., 2d Sess., 1949 U. S. Code Cong. Serv., p. 1551. See also pp. 1562, 1564, 1566; and 95 Cong. Rec. 4583, 9140.

[2] There is no basis in the record for the implication (petition, p. 12) that relocation requirements have been "totally disregarded" by federal and local public agencies. The complaint did not even assert that there was no adequate relocation plan but only that petitioners were entitled to a hearing by the administrator before approval (22a-23a). The source of some of the views referred to in the law review article cited in the petition seems to be petitioners' attorney. See 72 Harv. L. Rev. 504, 515 at note 102.

[3] Section 5 provides for administrative hearing in the case of "adjudication required by statute to be determined on the record after opportunity for an agency hearing". 60 Stat. 239, 5 U. S. C. § 1004.

dents was remote,[1] for federal aid was not a prerequisite to the city's power to condemn under state law,[2] and only because federal aid was sought was there any obligation for the city to comply with the Housing Act, or any call for a relocation plan. Moreover, even if the federal capital grant contract with the city had had a more direct impact on individuals within the area, there is no constitutional right to a hearing before a federal official may expend funds upon his determination that statutory requirements have been met,[3] and where, moreover, the determination is one which might have been made summarily by the Congress.[4]

Petitioners' claim of right to a hearing—by virtue either of the Constitution or Section 5 of the Administrative Procedure Act—stems essentially from the contention that the administrator made an "adjudication" (petition, pp. 13-15). That this was not the character of his acts results from the nature of his function under the Housing Act, which is to make federal funds avail-

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[1] In this respect, among others, there is a fundamental difference between the situation here and that in *Parker* v. *Fleming*, 329 U. S. 531 (1947). There, the certificate of the administrator, directed to the individual case, permitted an eviction which would otherwise have been illegal.

[2] New York General Municipal Law, § 72-k.

[3] See separate concurrence of Mr. Justice Frankfurter in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 167 (1951), citing *United States* v. *Babcock*, 250 U. S. 328; *cf. United States ex rel. Dunlap* v. *Black*, 128 U. S. 40.

[4] *Bi-Metallic Co.* v. *Colorado*, 239 U. S. 441 (1915); see also the above-mentioned concurrence. Any effect on petitioners' occupancy results of course from the city's choice of the particular locality for redevelopment. And this Court has settled that the necessity of taking the particular property for a public purpose is a legislative determination, as to which there is no right to a hearing. *Rindge Co.* v. *Los Angeles*, 262 U. S. 700 (1923); *Bragg* v. *Weaver*, 251 U. S. 57 (1919).

able to local bodies in accordance with Congressional directives. Cases of "adjudication" cited by petitioners (pp. 13-14) deal with situations which are not analogous.

In the absence of adjudication, there is likewise no force to petitioners' arguments that (apparently regardless of the nature of the determination) a hearing is essential to proper exercise of discretion; and that to rely on any information other than that adduced at a hearing is arbitrary, capricious, and a denial of due process. The cases cited (petition, pp. 14-15) are not susceptible of such distortion as to support petitioners' contentions. Statements and decisions as to "adjudications which have serious impact on private rights"[1] (though made by administrative agencies), or involving the proper evidentiary basis for an adjudication, cannot be torn out of context and applied to the entirely different, non-adjudicative type of decision here involved: *i.e.*, evaluating a slum clearance plan to determine whether federal funds should be granted.

Nor can it be inferred that the administrator's determination lacked reasonable factual basis merely because he held no hearing.

As required by the Housing Act, public hearings were had before two city agencies responsible for formulating the project plan and relocation procedures. It would be novel doctrine to imply any constitutional requirement for three hearings.

Finally, a year and a half passed between rejection of the petition to the administrator and commencement of this action, and meantime fundamental changes of

[1] *Cf. Wong Yang Sung v. McGrath*, 339 U. S. 33, 37 (1950).

position occurred. No explanation is or can be offered for the delay. This action is barred by *laches*. *Hays v. Port of Seattle*, 251 U. S. 233, 238-9 (1920).

Conclusion

The questions raised are not substantial and lack merit. The petition should be denied.

Respectfully submitted,

WILLIAM ELDRED JACKSON
15 Broad Street
New York 5, New York
Attorney for Lincoln Center for the Performing Arts, Inc., Respondent.

REBECCA M. CUTLER
15 Broad Street
New York 5, N. Y.
Of Counsel.

April 8, 1959.